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BEFORE THE

**Federal Communications Commission**

FEDERAL COMMUNICATIONS COMMISSION  
1930 L STREET, N.W.  
WASHINGTON, D.C. 20541  
SECRETARY

WASHINGTON, D.C.

In the Matter of

Petition of the State of Ohio

For Authority to Continue to Regulate  
Commercial Mobile Radio Services

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PR File No. 94-SP7

94-109

**OPPOSITION OF THE  
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

Michael F. Altschul  
Vice President, General Counsel

Randall S. Coleman  
Vice President for  
Regulatory Policy and Law

Andrea D. Williams  
Staff Counsel

**CELLULAR TELECOMMUNICATIONS  
INDUSTRY ASSOCIATION**  
1250 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036

September 19, 1994

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## SUMMARY

Given the dynamic and competitive nature of the CMRS marketplace, and because the Petition has failed to meet the statutory standard and the requisite burden of proof, the Petition should be denied.

When Congress amended § 332(c) of the Communications Act, it granted the Commission discretion to forbear from imposing certain Title II requirements on CMRS providers. Consistent with its desire to eliminate unnecessary and burdensome regulation, Congress also preempted state regulation of entry and rates for all reclassified CMRS providers. By these actions, Congress sought to create a uniform, nationwide, and streamlined regulatory regime for CMRS.

Before the Commission may grant a state petition to regulate CMRS, the state must offer more than a simple desire to regulate CMRS. Rather, the state must prove, with evidence of market conditions, that rate regulation is necessary to protect against market failure within that state. Such a showing is difficult, if not impossible, to make in view of the Commission's definitive conclusion that the CMRS market is competitive.

Regulation imposes burdensome costs; it also can harm competition and cause rates to remain higher than competitive levels. The Commission's open entry policies,

and its systematic efforts to eliminate artificial distinctions between the various commercial mobile services, have increased the level of competition and contributed to the rapid expansion of the wireless industry.

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**OPPOSITION OF THE  
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")<sup>1</sup> respectfully submits its comments in opposition to the State of Ohio's petition filed in the above-captioned proceeding.<sup>2</sup> In its petition, the State of Ohio submitted a statement to preserve its right to regulate future rates and market entry of commercial mobile radio services offered within

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<sup>1</sup> CTIA is a trade association whose members provide commercial mobile radio services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

<sup>2</sup> In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, PR File No. 94-SP7 (August 9, 1994).

the State.<sup>3</sup> As demonstrated below, because the State of Ohio has not met the stringent statutory burden required for retaining rate regulation, its petition should be denied.

## **INTRODUCTION**

Before the Commission may grant a state petition to regulate commercial mobile radio services ("CMRS"), the Communications Act imposes on the state the burden of proving that market conditions for CMRS within that state fail to provide subscribers with adequate protections. In satisfying its burden of proof, a state must offer more than a simple desire to regulate CMRS. Rather, the Commission requires a state to submit pertinent evidence demonstrating that intrastate market conditions are inadequate to protect consumers and that CMRS providers are imposing unjust and unreasonable rates upon their subscribers.

The State of Ohio not only has failed to meet the requisite burden of proof. It also has failed to offer any pertinent

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<sup>3</sup> Congress has specifically preempted the authority of the states to regulate the entry of any commercial mobile service. See Section 332(c)(3)(A) of the Communications Act. Accordingly, CTIA requests the Commission to deny the petitioner's request for authority over entry regulation of commercial mobile radio services in the State of Ohio.

evidence of market conditions to support its attempt to apply its regulations. Therefore, in view of the explicit statutory mandate generally to preempt state regulation of CMRS entry and rates, as well as the dynamic and competitive nature of the CMRS marketplace, the Commission should deny the State's petition.

**I. CONGRESS GENERALLY PREEMPTED THE STATES FROM REGULATING INTRASTATE CMRS RATES.**

When Congress enacted § 6002(b)(2)(A) of the Omnibus Budget Reconciliation Act of 1993,<sup>4</sup> it amended § 332(c) of the Communications Act in several significant ways. In recognition of the disparate regulatory treatment of mobile service providers, Congress revised § 332 to ensure that substantially similar services would be subject to similar regulation. In recognition of the dynamic, competitive nature of the mobile service marketplace, it granted the Commission discretion to forbear from imposing certain Title II requirements on CMRS providers. Consistent with its desire to eliminate unnecessary and burdensome regulation on CMRS providers, Congress also

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<sup>4</sup> Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 312, 393 (1993).

preempted state regulation of entry and rates for all reclassified CMRS providers.<sup>5</sup>

By these actions, Congress sought to create a uniform, nationwide, streamlined regulatory regime designed to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."<sup>6</sup> Thus, only under limited circumstances of demonstrated market failure, did Congress permit states to petition the Commission for the authority to regulate the rates of CMRS providers.<sup>7</sup> Specifically, § 332(c)(3)(A) requires the FCC to grant a state petition to retain authority to regulate intrastate CMRS rates only if the state can demonstrate that:

market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable

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<sup>5</sup> 47 U.S.C. § 332(c)(3).

<sup>6</sup> H.R. REP. NO. 111, 103d Cong., 1st Sess. 259-261 (1993) ("House Report"). The House Report goes on to state that regulation should "enhance competition and advance a seamless national network" of commercial radio services.

<sup>7</sup> 47 U.S.C. § 332(c)(3)(A).



rates or rates that are unjustly or unreasonably discriminatory.<sup>8</sup>

In reviewing state petitions, Congress directed the Commission to "be mindful of the . . . desire to give the policies embodie[d] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice."<sup>9</sup> In keeping with this policy directive, the Commission should refrain from subjecting CMRS providers to unnecessary and burdensome state regulation.

**II. THE COMMISSION'S RULES REQUIRE STATES TO MEET THE SIGNIFICANT BURDEN OF PROVING THAT INTRASTATE RATE REGULATION MUST BE RETAINED.**

The Commission, in its implementing regulations, has demonstrated its fidelity to both the statutory language and congressional intent by establishing regulatory parity among CMRS

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<sup>8</sup> Id. § 332(c)(3)(A)(i). Under an alternative test, states must demonstrate that such market conditions exist and such services have become a substitute for land line telephone exchange service in that state. Id. § 332(c)(3)(A)(ii). Moreover, to be eligible to file a petition to retain rate regulation authority, a state must have: (1) "in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in the State on such date[;]" and (2) petitioned the Commission before August 10, 1994 to extend its pre-existing regulations. 47 U.S.C. § 332(c)(3)(B).

<sup>9</sup> House Report, supra note 4, at 261. See also, H.R. CONF. REP. No. 213, 103d Cong., 1st Sess. 494 (1993).

providers, promoting competition in the mobile communications marketplace through regulatory forbearance, and requiring states to prove that continuing state rate regulation is necessary.<sup>10</sup> In this regard, the Commission places the burden of proof squarely upon the states to demonstrate the need for continued rate regulation. As discussed more fully below, in this case, the State of Ohio has not met its burden.

Recognizing that the existing level of competition is "a strong protector" of the interests of consumers,<sup>11</sup> the Commission stated that:

state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers.<sup>12</sup>

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<sup>10</sup> Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket No. 93-252, 9 FCC Rcd 1411, 1418 (1994) ("Second Report and Order").

<sup>11</sup> Id. at 1421.

<sup>12</sup> Id. at 1419 (emphasis added). See also Id. at 1504 ("Any state filing a petition pursuant to Section 332(c)(3) shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates") (emphasis added).

Therefore, states "must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."<sup>13</sup>

For states to make the necessary demonstration that market conditions fail to protect consumers from unjust or unreasonable rates or unreasonably discriminatory rates, the Commission enumerated eight different types of evidence, information, and analysis that states might provide pertinent to the Commission's examination of the marketplace.<sup>14</sup>

Specifically, the Commission expressed a preference for the following types of evidence: (1) information about the CMRS providers in the state, and the services they provide, (2) customer trends, annual revenues, and rates of return for each in-state company, (3) rate information for each in-state company, (4) the substitutability of services that the state seeks to regulate, (5) barriers to entry for new entrants to the market for such services, (6) specific allegations of fact regarding anti-competitive or discriminatory practices by in-state

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<sup>13</sup> Id. at 1421 (emphasis added).

<sup>14</sup> Id. at 1504-1505.

providers, (7) particularized evidence that shows systematically unjust and unreasonable rates, or unduly discriminatory rates charged by in-state providers, and (8) statistics regarding customer satisfaction and complaints to the state regulatory commission regarding service offered by in-state CMRS providers.<sup>15</sup>

Although the above list is not exclusive, it clearly indicates an admonition by the Commission that generalized claims and/or the mere desire to continue to regulate CMRS are insufficient to meet the statutory burden of proof that state regulation is necessary in view of existing market conditions. Thus, merely advancing generalized policy arguments or legal theories is insufficient; rather, "the states must submit evidence to justify their showings."<sup>16</sup>

The necessary evidentiary showing facing state petitioners is further heightened by the Commission's recent determination to

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<sup>15</sup> Id.

<sup>16</sup> Id. at 1504 (emphasis added). Moreover, the Commission also requires that any state petition must "identify and provide a detailed description of the specific existing or proposed rules that it would establish if [the Commission] were to grant [the] petition." Id. at 1505.

forbear from imposing tariff requirements on all CMRS providers. As discussed above, Congress revised § 332 to grant the Commission authority to forbear from imposing certain Title II requirements on CMRS providers if the FCC determined (1) that such regulations were not necessary to ensure just and reasonable rates and were not unjustly or unreasonably discriminatory, (2) that such regulations were not necessary to protect consumers, and (3) that such forbearance is consistent with the public interest.<sup>17</sup>

The issues that the Commission must consider in connection with a state's petition to regulate CMRS are essentially the same as those it considers in deciding to forbear from imposing its own regulations on CMRS. Both statutory tests require the Commission to assess the impact of market conditions on the reasonableness of rates and the protection of consumers. A state desiring to regulate CMRS, thus, must present the Commission with evidence which dictates a conclusion contrary to that reflected in the Commission's recent decision to forbear from interstate rate regulation. That is, Congress requires a

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<sup>17</sup> 47 U.S.C. § 332(c)(1)(A).

state to prove, with evidence of market conditions, that rate regulation is necessary to protect against market failure within that state. Such a showing is very difficult, if not impossible, to make in view of the Commission's definitive conclusion that the CMRS market is competitive.

After considering the state of competition in the larger CMRS arena, as well as the need to protect consumers, the Commission aptly concluded that, "there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings."<sup>18</sup> Therefore, it chose to forbear from interstate CMRS rate regulation, in recognition that "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power."<sup>19</sup> Moreover, it found that the "application of Title II regulations may impede competition," while "reducing regulatory

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<sup>18</sup> Second Report and Order, supra note 8, at 1478 (emphasis added).

<sup>19</sup> Id.

requirements . . . tends to encourage market entry and lower costs."<sup>20</sup>

Many of the same reasons that supported the Commission's decision to forbear from tariffing interstate rates for CMRS are equally applicable to the issue of intrastate rate regulation.

[R]equiring tariff filings can . . . take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings . . . and impose costs on carriers that attempt to make new offerings. Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. . . . [T]ariffing, with its attendant filing and reporting requirements, [also] imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.<sup>21</sup>

Having concluded that "cellular providers do face some competition today, and [that] the strength of competition will increase [in] the near future,"<sup>22</sup> the Commission found tariff forbearance to be within the public interest. To now permit states essentially to reimpose such obligations, albeit on the state level, the state must bear the substantial burden of

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<sup>20</sup> Id. at 1475, 1478.

<sup>21</sup> Id. at 1478.

<sup>22</sup> Id.

proving that the significant direct and indirect costs associated with rate regulation are necessary within the intrastate market, contrary to the Commission's overall finding of competition. The State of Ohio has not done so here.

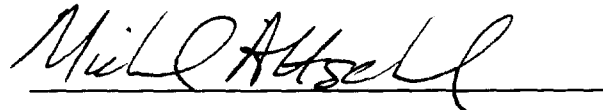


## CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny the petition of the State of Ohio for the authority to continue its regulation of rates and market entry of commercial mobile radio services within the State.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS  
INDUSTRY ASSOCIATION**

A handwritten signature in black ink, appearing to read "Michael Altschul", is written over a horizontal line.

Michael F. Altschul  
Vice President, General Counsel

Randall S. Coleman  
Vice President for  
Regulatory Policy and Law

Andrea D. Williams  
Staff Counsel

1250 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036

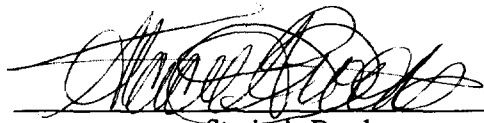
September 19, 1994

CERTIFICATE OF SERVICE

I, Stacie A. Brooks, hereby certify that on this 19th day of September, 1994, copies of the foregoing Opposition of the Cellular Telecommunications Industry Association were served by first class U.S. mail upon the State Petitioner and by hand delivery upon the following parties:

William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

International Transcript Service  
1919 M Street, N.W., Room 246  
Washington, D.C.; 20037

  
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Stacie A. Brooks